Supreme Court, U.S.
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No. 99-441

In The

# Supreme Court of the United States

LEON KIRKPATRICK, et al.,

*Petitioners,*

v.

CITY OF BANGOR,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The State Of Maine**

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

Respondent attempts to distinguish the cases cited in Petitioner's brief, but those cases are only a portion of the long line of judicial decisions which have recognized due process limitations on governmental power to destroy private property. Collectively, they represent the "time tested" parameters of due process, noted by this Court in *Goldblatt v. Town of Hempstead*, 396 U.S. 590, 82 S.Ct. 987, 8 L.Ed. 2d 130 (1962).

For over seventy-five years, Texas cases have recognized that a nuisance cannot be demolished if it can be abated by any other means. *Crossman v. Galveston*, 112 Tex. 303, 247 S.W. 810, 26 ALR 1210 (1923); *Houston v. Lourie*, 148 Tex. 39, 224 S.W. 2d 871, 14 ALR 2d 61 (1949).

The Appellate Division of the New York Supreme Court long ago recognized the proposition sought to be established here, that abatement of a nuisance through means other than destruction of the property was preferred. *Health Dept., City of New York v. Dasson*, 21 App. Div. 348, 47 N.Y.S. 641 (1897).

In *Abraham v. City of Warren*, 67 Ohio App. 492, 37 N.E. 2d 390 (1941), the Court recognized the potentially arbitrary nature of the police power to destroy property declared to be a nuisance. It was for that reason that an owner was entitled to a reasonable time and opportunity to repair before destruction could be ordered.

In *Horne v. City of Cordele*, 140 Ga. App. 127, 230 S.E. 2d 333 (1970), the Georgia Court of Appeals expressed the prevailing view as follows:

> [W]hile the right exists in the exercise of the police power to destroy property which is a menace to public safety and health, public necessity is the limit of that right and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way. [citations omitted]

Cases from numerous other states support this view. *Albert v. Mountain Home*, 81 Id. 74, 337 P.2d 377 (1959); *Aurora v. Meyer*, 38 Ill. 2d 131, 230 N.E. 2d 200 (1967); *Perepletchikoff v. City of Los Angeles*, 174 Cal. App. 2d 697, 345 P.2d 261 (1959); cf. *Shaffer v. City of Atlanta*, 223 Ga. 249, 154 S.E. 2d 241 (1967).

Thus, even if respondent is able to distinguish a particular case in its facts, the well-established principle which emerges is that public necessity is the limit of the right of destruction.

Stated another way, in terms of the three-prong test set forth in *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1970), a municipality has a legitimate interest in abating nuisances; however, that interest does not extend to a right to destroy private property when the governmental interest can be vindicated by less draconian means.

Over one hundred years ago, in discussing the due process clause, this Court noted that governmental action which involved an "unnecessary invasion" into private property rights was invalid under the 14th Amendment. *Lawton v. Steele*, 152 U.S. 133, 138, 14 S.Ct. 499, 38 L.Ed. 2d 385 (1894). Petitioners' position tracks that concept: destruction of property when there are other, less drastic means, constitutes an "unnecessary invasion" of their

property rights. The Respondent's interest is in abating the nuisance; it has no legitimate interest in destroying the property. The Maine Supreme Judicial Court's decision advances well beyond any concept of public necessity, which has long been recognized as the outer limit of governmental police power. The Court should grant the petition to affirm that limit.

Respectfully submitted,

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